STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALAN MCCLUSKEY,

Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 195620
Oakland Circuit Court
LC No. 95-140744 FC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court enhanced defendant's sentence as a second habitual offender, MCL 769.10; MSA 28.1082, and sentenced him to concurrent terms of imprisonment of five to fifteen years for his assault conviction and two to seven years for his felon in possession of a firearm conviction. Both sentences are consecutive to defendant's mandatory two-year term of imprisonment for his felony-firearm conviction. We affirm.

This action arises from a shooting incident at the home of Tamara Stephens in Pontiac on July 11, 1995. Stephens had argued with defendant's girlfriend a few days before the shooting. Defendant called Stephens several times on the date of the shooting to confront her about that altercation, but Stephens declined to speak to him. Later that evening, Stephens observed defendant riding in the passenger seat of a yellow truck that twice drove slowly past her house. Ninety minutes later, Stephens again observed the yellow truck drive past her home. The truck turned around at the end of the street and returned toward her house. As it passed the house, Stephens observed a man, whom she believed was defendant, rise from the bed of the truck and point what appeared to be a rifle at the house. No shots were fired. The truck, however, reappeared approximately an hour later and once again drove past the home, turned around, and slowly approached the house. As the car passed, Stephens

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

observed defendant fire a long-barreled gun in her direction. The bullet lodged in the exterior of the house, directly below the window behind which Stephens stood.

I. Jury Selection

Defendant first contends that his right to a trial before an impartial jury was violated because the prosecutor and defense counsel exercised multiple peremptory challenges at one time before the trial court replaced the first of the excused jurors. We find no error requiring reversal. In *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990), our Supreme Court overturned this Court's reversal of the defendant's convictions on the basis of an improper jury selection method and reinstated the convictions for the reasons stated in Judge Sawyer's dissent. Judge Sawyer reasoned that the defendant waived the issue by failing to use four of his peremptory challenges and expressing his satisfaction with the jury. *People v Russell*, 182 Mich App 314, 326; 451 NW2d 625 (1990) (Sawyer, J. dissenting); see also *People v Paasche*, 207 Mich App 698, 703; 525 NW2d 914 (1994), and *Leslie v Allen-Bradley Co*, 203 Mich App 490, 492-493; 513 NW2d 179 (1994). In this case, defendant used only three of his twelve peremptory challenges and defense counsel stated that he was satisfied with the jury. We therefore conclude that the error, if any, does not require reversal because the jury selection method did not impede defendant's ability to select a fair and impartial jury. *Russell, supra* at 326.

II. Evidentiary Error

Defendant next argues that the trial court erred in accepting a stipulation to the entry of the general information and judgment of sentence concerning defendant's prior conviction of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. Again, we find no error requiring reversal. Where a defendant offers to concede the fact of a prior conviction for purposes of a charge of felon in possession of a firearm, the admission of evidence beyond the stipulation may constitute prejudicial error. *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997); see also *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997). In this case, however, defendant did not offer to stipulate to the fact of his prior conviction, but rather stipulated to entry of other evidence establishing the existence of the conviction. A party may not request a certain action of the trial court and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); cf. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Further, the jury's knowledge of the nature of defendant's underlying conviction did not prejudice him because that offense was not a gun crime and was not similar to the charges in this case. See *Swint, supra* at 378; *Old Chief, supra* at 652.

III. Directed Verdict

Defendant contends that the trial court erroneously denied his motion for a directed verdict regarding the charge of assault with intent to murder, MCL 750.83; MSA 28.278, because the evidence was not sufficient to establish that he intended to kill. We disagree. In reviewing a trial court's decision regarding a directed verdict, this Court considers the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the offense proven beyond a reasonable doubt. *People v Jolly*,

442 Mich 458, 466; 502 NW2d 177 (1993). To support a conviction of assault with intent to murder, the prosecution must prove (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

In this case, the prosecution presented sufficient evidence to support a conviction of assault with intent to murder. Defendant made several threatening phone calls to Stephens before the assault. Defendant then drove past Stephens' house four times over the course of several hours. On the third pass, defendant rose from the bed of the truck as if to discharge a weapon, but did not shoot. On the fourth pass, however, defendant fired a long-barreled gun at Stephens as she stood behind the window of a lighted room. The bullet struck the front of the house directly below the window. A rational trier of fact could find on the basis of this evidence that defendant intended to kill Stephens when he discharged the rifle in the direction of the window behind which the clearly-visible Stephens stood. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

IV. Jury Instructions

We reject defendant's argument that the trial court erred in failing to instruct the jury sua sponte on felonious assault, MCL 750.82; MSA 28.277, intentional discharge of a firearm from a motor vehicle, MCL 750.234a; MSA 28.431(1), intentional discharge of a firearm at an occupied dwelling, MCL 750.234b; MSA 28.431(2), misdemeanor assault, MCL 750.81; MSA 28.276, intentionally aiming a firearm without malice, MCL 750.233; MSA 28.430, discharge of a firearm intentionally aimed without malice, MCL 750.234; MSA 28.431, and reckless use of a firearm, MCL 752.861; MSA 28.436(21). A trial court has no duty to instruct sua sponte on lesser included misdemeanor offenses. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982); *People v Ramsdell*, __ Mich App __; __ NW2d __ (1998), slip op p 7. Similarly, with the exception of the lesser-included offense of second-degree murder in cases where the defendant is charged with first-degree murder, a trial court has no duty to instruct sua sponte on lesser included felony offenses. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975); *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985). Therefore, the trial court did not err in failing to instruct the jury on the lesser offenses in this case. *People v Johnson*, 409 Mich 552, 562; 297 NW2d 115 (1980).

V. Effective Assistance

Defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to object to the jury selection method, failure to request instructions on lesser offenses, and decision to stipulate to the evidence establishing his prior conviction. We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In doing so, however, defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, in this case, review is foreclosed unless the alleged deficiency is apparent on the record because defendant did not raise this issue below. *Barclay*, *supra* at 672.

We conclude that defendant was not denied the effective assistance of counsel in this case. Defendant has failed to demonstrate that he was prejudiced by defense counsel's actions during jury selection because the selection method employed did not impede his ability to select a fair and impartial jury. Defendant likewise was not prejudiced by counsel's decision to stipulate to evidence of his prior conviction because, given the non-assaultive nature of that crime, the jury was unlikely to use the evidence for any improper purpose. Finally, defense counsel's decision not to request additional instructions on lesser offenses was a matter of trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). We will not second-guess counsel's strategic decision. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

VI. Remaining Issues

Defendant argues that the prosecutor improperly shifted the burden of proof during closing argument. The record, however, does not contain the transcript referenced in defendant's brief. Moreover, review of the prosecutor's closing argument reveals that he did not make the challenged remark. We therefore decline to consider this improperly presented argument. Cf. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993); *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988).

Finally, defendant asserts in his Standard 11 brief that the trial court did not have jurisdiction over this case because the prosecutor violated the 180-day rule. We disagree. The 180-day rule, MCL 780.131(1); MSA 28.969(1)(1), is designed to dispose of untried charges against an inmate to provide him with the opportunity to serve concurrent sentences. *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). Generally, the period commences when either the prosecutor knows that the defendant is incarcerated in state prison or the Department of Corrections knows or has reason to know that a criminal charge is pending against the inmate/defendant. MCR 6.004(D)(1). The rule, however, does not necessitate that trial actually commence within the 180 days. It merely requires that the prosecutor make a good faith effort to bring the charge to trial within that period. *Id.*; *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). The prosecutor must take good-faith action during the period and then proceed to ready the case for trial. *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959); *Bell, supra* at 279.

In this case, defendant began serving his sentence for his prior conviction on August 14, 1995. The preliminary examination in this case was held on August 17, 1995, the pretrial hearing occurred on February 9, 1996, and the trial commenced on February 22, 1996. On consideration of these events, the trial court denied defendant's motion to dismiss under the 180-day rule:

> [T]he Court finds that the prosecutor did make a good faith effort to writ the Defendant from State Prison upon receiving notice, and the delay in taking the defendant to trial was minimal. I believe it was one day or three days or something of that nature. But taking the totality of the circumstances, the Court finds that a good faith effort was made by the People and therefore the Motion to Dismiss the case for violation of the hundred and eighty days is denied.

We agree. The record reflects that the prosecutor took good faith action to bring the case to trial within the 180-day period and that the delay beyond the period was not accompanied by an intent not to bring the case promptly to trial. See *People v Finley*, 177 Mich App 215, 219-220; 441 NW2d 774 (1989); *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). Accordingly, the trial court properly denied defendant's motion to dismiss.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin